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THE STATUTORY RESTRICTIONS ON THE RIGHT OF CONTRACT IN THE FEDERAL EMPLOYER'S LIABILITY ACT.

Since the federal government and most of the states have enacted Employer's Liability Acts, it becomes important to know to what extent the employer's liability is lessened or modified when the employer provides a relief department which pays a certain benefit to the employee when he is injured or killed in the course of his employment.

Of course, the employer's liability in such cases depends greatly on the wording of the particular statute, yet the case of *McNamara v. The Washington Terminal Co., Wash. Law Rep.*, Vol. 38, No. 22, p. 343, is of particular interest, in that it established, in the interest of railway employees, the constitutionality of such a clause in an act which provides: "That no contract of employment, insurance, relief benefit, or indemnity for injury or death, entered into by or on behalf of an employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to an action brought to recover damages for personal injuries to or

death of such employee; provided, however, that upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or in case of his death to his personal representatives."

The right of contract is involved in all such cases as this, but that restrictions may be placed on such right in the interest of the general public, or for the preservation of the public health, morals or safety, is unquestioned. *Holden v. Hardy,* 169 U. S., 366; *Paterson v. Bark Endora,* 190 U. S., 169.

Statutes abolishing the fellow servant's rule in the interest of railway employees are not unconstitutional. *Herrick v. Railroad,* 31 Minn., 11; *Railroad v. Mackey,* 127 U. S., 205. It has also been settled by many adjudications that where a railway company maintains a relief department and the company contributes toward the relief fund, the injured employee has an election, either to accept the benefit afforded by the relief department, or to maintain his action against the company for the injuries sustained; but if he accepts the benefit from the relief department after his cause of action arises, he is estopped from bringing an action against the company for damages. *Johnson v. Railroad Co.,* 163 Pa. St., 127; *Hamilton v. St. Louis, K. & N. W. R. Co.,* 118 Fed., 92. The courts hold that this is not a contract exempting the company from future negligence, as the cause of action has already arisen. Neither is it against public policy, as the acceptance by the employee of the benefit of the contract, so far from securing to the employer immunity from liability for damages sustained by reason of his own negligence or that of his servants and agents, in fact, gives to the employee a certainty of some compensation, whether the injury was caused by the employer's negligence or not, with the option of the employee of pursuing his ordinary legal remedy if he elects to do so, instead of receiving the benefit which his contract affords. *Johnson v. Railroad Co., supra.*

But a statute which provides that the acceptance by the employee of the benefit of the contract shall not estop him from recovering damages, notwithstanding he may have given a release, has been held to be unconstitutional. *Sturjess v. At. Coast*

Line R. R., 80 S. C., 167; *At. Coast Line Co. v. Dunning*, 166 Fed., 850. The courts so hold on the ground above given, that the acceptance of the benefit of such a contract is not against public policy, but is for the benefit of the injured employee, and a statute which attempts to take away this right of contract is unconstitutional.

As has been stated, the principal case sustained the validity of a statute which took away this right of contract; but the federal statute in that case contained a provision that the common carrier should have the right of set-off of any sum it had contributed toward the relief fund, and thus the court distinguished it from the above cases where the employee has the right of election, but is estopped from bringing an action for damages if he elects to accept the benefit.

It seems, on principle, that the case was correctly decided. Congress has the constitutional power to make the carrier responsible to employees for injuries sustained through its negligence or the negligence of its servants and agents. *Railroad v. Mackey, supra;* and where Congress acting within its constitutional powers, provides a right or confers a benefit which did not before exist, it may also provide that no contract by which that right of benefit may be waived shall be of any validity. *McGuire v. Railway*, 131 Ia., 340.

As experience shows, the employee in the time of injury is not on an equal footing with the employer to contract, and often from dire necessity, he is forced to release his right of action against the company in order to receive the benefit afforded by the relief fund. The working of this statute does not bring hardship upon the employer as he is entitled to set-off all he has contributed toward the fund, and thus is not subjected to pay twice for the same injury.

It must also be remembered, in passing upon the validity of such a statute, that a corporation is a creature of the State, and, therefore, its right to contract is subject to be regulated and restricted by its creator, as the power to create necessarily implies the power to regulate. *Railroad v. Bristol*, 151 U. S., 556; *Railroad v. Matthews*, 174 U. S., 96.